ESTATE OF NOCTUSIE (WILLIE) WHIZ

(Deceased Yakima Allottee No. 124-3112)

IBIA 74-29 Decided November 19, 1974

Appeal from an order affirming will and decree of distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Alcohol

Evidence that decedent was a chronic alcoholic, but fails to establish that decedent had suffered damage to his brain to the degree that his memory or ability to reason was affected, or which fails to establish that he was intoxicated at the time of executing his will, is insufficient to rebut the testimony of attesting witnesses concerning the testamentary capacity of the deceased.

2. Indian Probate: Wills: Undue Influence: Failure to Establish, Opportunity

Undue influence is not shown when the mere opportunity existed for the exercise of influence upon the testatrix.

APPEARANCES: Tim Weaver of Hovis, Cockrill and Roy for William Austin Whiz, Jr., appellant; C. Montee Kennedy and Owen M. Panner of Panner, Johnson, Marceau and Karnopp for Arlene Katy Smith, Zelma Lee Smith, Mona Laverne Smith and Joseph Sidney Smith, appellees.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The record indicates the above-entitled matter came on for rehearing before Administrative Law Judge Robert Snashall on September 11, 1973. From the evidence adduced therein the Judge on October 9, 1973, affirmed, with minor modifications, his order of December 8, 1972, wherein he approved Noctusie (Willie) Whiz's last will and testament dated March 24, 1971. William Austin Whiz, Jr., hereinafter referred to as appellant, through his attorney, has appealed to this forum the said order of October 9, 1973.

The document in question, as indicated by the record, was executed by Noctusie (Willie) Whiz, hereinafter referred to as testator,

on March 24, 1971, at Madras, Oregon, in the law offices of Rodriguez and Albright. With the exception of a one dollar bequest to the appellant, the residue of the testator's trust estate is devised in equal shares to his four grandchildren, Arlene Katy Smith, Zelma Lee Smith, Mona Laverne Smith, and Joseph Sidney Smith, being children of the testator's prior-deceased daughter, Ramona Smith.

The appellant, as basis for his appeal, alleges that the testator lacked testamentary capacity to execute the last will and testament dated March 24, 1971, and that said will was the result of undue influence exerted by one Alvis Smith, Sr., designated as executor under the will.

A careful review of the record clearly indicates appellant's contentions as hereinabove set forth are entirely without merit.

There appears to be no dispute that the testator was chronically addicted to the use of alcohol for the greater part of his adult life as appellant contends. However, the appellant has failed to establish that the long and continued use of alcohol resulted in damage to his [testator's] brain to such a degree that his memory or ability to reason was affected or impaired. Moreover, the appellant has failed to establish that the testator was intoxicated on the date the will was executed. The testimony of the scrivener and

the attesting witnesses clearly indicates the testator was not under the influence of any intoxicating liquor on March 24, 1971, the date on which the will was executed.

[1] The Department has consistently held that a showing of a state of habitual drunkenness of itself does not constitute testamentary incapacity. Estate of Amelia Keyes Abbott Viramontes Walker, IA-1339 (April 5, 1966), affirmed Simons v. Udall, 276 F. Supp. 75 (D. Mont. 1967). Evidence that a decedent was a chronic alcoholic, but fails to establish that the decedent had suffered damage to his brain to the degree that his memory or ability to reason was affected, or which fails to establish that he was intoxicated at the time of executing his will, is insufficient to rebut the testimony of attesting witnesses concerning the testamentary capacity of the decedent. Estate of William Bigheart, Jr., IA-T-21 (August 8, 1969) and IA-T-21 (Supp.) (September 4, 1969). In the Estate of Joseph Garrick, A-24205 (November 5, 1945) the Department held that if a testator, who was almost continuously under the influence of alcohol during the period before making his will, was sober at the time of making the will, he was competent to devise his property as he saw fit. See also Estate of John J. Akers, 1 IBIA 8, 77 I.D. 268 (1970), affirmed Akers v. Morton, 333 F. Supp. 184 (D. Mont. 1971).

[2] The appellant's contention that the will was a result of undue influence is clearly not substantiated by the evidence. At most, the evidence in the case at bar establishes mere opportunity for exertion of undue influence and suspicion on the part of appellant that such influence was exerted. Mere opportunity of undue influence and suspicion thereof is insufficient to invalidate a will. Estate of Conrad Mausape, IA-T-14 (December 13, 1968); Estate of Otto Littleman (Lame Woman), IA-T-25 (June 5, 1970).

Considering the record as presently constituted, the Board finds that the appellant has clearly failed to come forth with any evidence to support his contentions regarding lack of testamentary capacity and undue influence. Accordingly, the decision of October 9, 1973, should be affirmed and the appeal dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge issued October 9, 1973, in the estate herein be, and the same is HEREBY AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

Alexander H. Wilson
Administrative Judge
Board of Indian Appeals

I concur:

Mitchell J. Sabagh
Administrative Judge
Board of Indian Appeals